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The Treatment of Presumptions in Illinois: Adding Insult to Injury?

Joanne F. Hurley

COMMENT

THE TREATMENT OF PRESUMPTIONS IN ILLINOIS: ADDING INSULT TO INJURY?

Presumptions[1] are rules of law that accept proof of a particular fact or set of facts as establishing the existence of a second fact, despite the absence of direct proof of the presumed fact.[2] Although a party who has the burden of proof[3] in a trial may be aided in establishing a claim or defense by operation of a presumption, the usefulness of presumptions is somewhat curtailed by the long-standing confusion that has existed in this area. In Illinois, the absence of well-reasoned decisions has contributed to the confusion.[4] Some presumption deci-

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1. Although presumptions exist in both the criminal and civil context, this Comment will focus on civil presumptions. For an excellent treatment of the entire field, *see* C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 342-46 (2d ed. E. Cleary 1972 [hereinafter cited as MCCORMICK]. For an extensive survey of Illinois civil and criminal presumptions *see* R. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS 441-75 (4th ed. 1972).

As one commentator noted, "The legal force of a presumption is then the additional weight given by it to data not in itself of sufficient probative force to permit or require the jury to find the existence of the fact presumed." Comment, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 313 (1920) [hereinafter cited as Bohlen]. This is Professor Bohlen's student work, in which he mounted the first critical review of Thayer's bursting bubble theory. In this same work Bohlen proposed the presumption-by-presumption theory. *See* notes 72-77 and accompanying text *infra*.

2. McElroy v. Force, 38 Ill. 2d 528, 532-33, 232 N.E.2d 708, 710 (1967).

3. The concept of burden of proof encompasses two components: burden of production and burden of persuasion. The former requires a party to produce evidence sufficient to establish a prima facie case. *See* note 49 *infra*. The latter requires a party to prove the issue by convincing the fact finder. In civil cases, the party bearing the burden of persuasion has to convince the fact finder either by a preponderance of the evidence or by a higher standard requiring clear and convincing evidence. *See* J. WIGMORE, 9 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2494 at 293 (3d ed. 1940) [hereinafter cited as WIGMORE]; MCCORMICK, *supra* note 1, at 783-84.

Some confusion has existed in the use of the term "burden of proof." Some Illinois courts have used this term to refer to the persuasion burden while others use it to refer to both burdens. *Compare* Donovan v. St. Joseph's Home, 295 Ill. 125, 130-31 (1920) (in which the court explained the duality of the concept) *with* McElroy v. Force, 38 Ill. 2d 528, 532, 232 N.E.2d 708, 710 (1920) (in which the court used the term burden of proof to refer to the persuasion burden).

4. Indicative of the confusion is the fact that three commentators have stated divergent views regarding Illinois courts' perception of the procedural effect of presumptions. The first credits Illinois courts with utilizing a variety of procedural effects for presumptions which include the Morgan and bursting bubble theories discussed *infra*, although admitting that they only acknowledge the bursting bubble theory. Comment, *Illinois Presumptions and the Uniform Rules of Evidence*, 49 NW. U. L. REV. 657 (1954). The second suggests a modern trend of reliance on the Morgan theory. E. CLEARY, HANDBOOK OF ILLINOIS EVIDENCE 59 (2d ed. 1963) [hereinafter cited as CLEARY]. The third and most recent article asserts that Illinois does not recognize presumptions but only inferences which they term presumptions. Graham, *Presumptions in Civil Cases in Illinois: Do they Exist?*, 1977 S. ILL. U.L.J. 1.

sions have failed to define clearly the scope of presumptions,[5] and others have allocated procedural effects to different presumptions without clearly articulating reasons for doing so.[6] In addition, decisions often purport to assign one procedural effect while in fact assigning another.[7]

In this area of law, clear reasoning is indispensable because of the great diversity of presumptions,[8] the complex reasons underlying the creation of particular presumptions,[9] and the several procedural effects potentially attributable to different presumptions.[10] Only fully elaborated decisions will give the necessary guidance to practitioners.

However, the most recent Illinois Supreme Court decision on this subject, *Diederich v. Walters*,[11] does not establish a clear directive concerning the procedural effects of presumptions. Indeed, the decision reveals the same lack of reasoned elaboration typical of prior cases. The *Diederich* court's analysis is neither wholly consistent with past Illinois case law nor reconcilable with any other available theory suggesting an appropriate function for presumptions.

The purpose of this Comment is to explore the practical and theoretical problems that presumptions generate. A presentation of the four major theories that define presumptions and designate their procedural effect will form the basis for an examination of past Illinois experience with the law of presumptions and the rationale of *Diederich v. Walters*. The Comment suggests that the Illinois Supreme Court must clarify its approach in order to provide real guidance to trial courts, and proposes the adoption of the presumption-by presumption theory.

I. THE NATURE AND PROCEDURAL EFFECT OF PRESUMPTIONS

Much of the confusion which has characterized the field of presumptions results from the indefinite scope attributed to the term "presumption."[12] The inclusion of inferences and substantive rules

5. *See* notes 79-88 and accompanying text *infra*. *See also* Graham, *Presumptions in Civil Cases: Do they Exist?*, 1977 S. ILL. U.L.J. 1.

6. *See* notes 89-98 and accompanying text *infra*.

7. *See* notes 99-101 and accompanying text *infra*.

8. It is impossible to give the exact number of presumptions that exist in Illinois. A low estimate would be approximately seventy-five. CLEARY, *supra* note 4, at 59-69; R. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS 441-71 (4th ed. 1972).

9. *See* notes 20-28 and accompanying text *infra*.

10. *See* notes 49-78 and accompanying text *infra*.

11. 65 Ill. 2d 95, 357 N.E.2d 1128 (1976).

12. Problems arise because courts fail to recognize that not all decisions which use the phrases "there is the presumption" or "it is presumed" are pronouncing the existence of a presumption. Bohlen, *supra* note 1, at 310. The courts fall prey to what Cleary has called "the

of law within the presumption category has contributed to the problem.[13] A clear understanding of the scope of the term is essential.

As rules of law, presumptions draw mandatory connections between facts which enable a party to establish a prima facie case.[14] If a party can prove the basic facts necessary to raise a particular presumption, an additional, unproved fact will be recognized.[15] For instance, in a contract action an insured might resort to the use of a presumption where an insurance company, as a defense to payment on the policy, denies receipt of the premium mailed by the insured.[16] In most situations, receipt would be within the sole knowledge of the defendant insurance company, and no direct or circumstantial evidence would be available to the plaintiff to avoid a directed verdict. The plaintiff's proof that the letter was properly addressed and posted constitutes the basic facts giving rise to the presumption of receipt.[17] Yet, because presumptions are rebuttable, their impact on the case might be only temporary.[18] The defendant,

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fallacy of the transplanted category." He explains that the "persistent use of the term presumption to describe these nonpresumption situations must inevitably lead to difficulty, in view of the natural assumption that things of the same name have the same characteristics." CLEARY, *supra* note 4, at 60. *See also,* Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195, 196 (1953).

13. One commentator has recently suggested that the failure of some Illinois courts to distinguish between inferences and presumptions presents the possibility that presumptions, as generally defined, do not exist in Illinois. *See* Graham, *Presumptions in Civil Cases in Illinois: Do They Exist?,* 1977 S. ILL. U.L.J. 1.

14. McElroy v. Force, 38 Ill. 2d 528, 531, 232 N.E.2d 708, 710 (1967). *See generally,* B. JONES, 1 JONES ON EVIDENCE § 3.2 (6th ed. S. Gard 1972) [hereinafter cited as JONES]; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 317 (1898) [hereinafter cited as THAYER].

15. *See, e.g.,* Lohr v. Barkman Cartage Co., 335 Ill. 335, 167 N.E. 35 (1929) (evidence of agency necessary to raise the presumption that agency relationship was a continuous relationship which existed at the time of the accident); Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 237 N.E.2d 732 (1st Dist. 1968) (evidence of ownership of involved vehicle was the necessary condition precedent to presumption that vehicle was operated by the owner's agent).

16. Courts recognize the presumption that mail is presumed to have been delivered if the sender has not had the mail returned and can also offer proof as to properly addressing the letter, giving the return address, posting the letter, and affixing the stamp. *See e.g.,* Talmage v. Union Cent. Life Ins. Co., 315 Ill. App. 623, 43 N.E.2d 575 (1st Dist. 1942) (presumption recognized where letter was sent informing defendant of the beneficiary's address and requesting notice of any defaults).

17. *See, e.g.,* Winkfield v. American Continental Ins. Co., 110 Ill. App. 2d 156, 249 N.E.2d 174 (1st Dist. 1969) (acknowledging basic facts but finding insufficient facts existed to raise the presumption).

18. As soon as contrary evidence is introduced, the presumption's temporary existence is terminated and the presumption is said to be "overcome." Four different theories suggest the quantum of evidence that is necessary for this purpose. Under each, the presumption is said to be rebutted, yet each approach contemplates a different quality and quantity of evidence. In addition, the theories differ as to whether the rebuttal issue will be decided as a question of law or a question of fact.

by introducing contrary evidence, might prove that the letter was never received.[19]

Convenience,[20] fairness,[21] probability,[22] policy,[23] or a combination of these considerations[24] may influence a court or legislature to establish a presumption. A presumption might be created to expedite the trial process where there is a procedural impasse due to the lack of evidence,[25] to promote fairness where one party has peculiar access to information,[26] or to insure socially desirable results.[27] The general reliability of the mails as well as the recognition by the courts that the sender is otherwise unable to prove that the premium was received, prompted the courts to create the mail presumption.[28]

In contrast, inferences exist as the result of the factfinder's own

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19. *See, e.g.*, Alger v. Community Amusements Corp., 320 Ill. App. 184, 50 N.E.2d 594 (2d Dist. 1943) (mail presumption overcome by the introduction of contrary evidence).

20. *See, e.g.*, Steen v. Modern Woodmen of America, 296 Ill. 104, 129 N.E.546 (1920) (presumption of death after seven years unexplained absence); Mills v. Mills, 27 Ill. App. 2d 50, 169 N.E.2d 177 (2d Dist. 1960) (note which has been due for twenty years without interest charged or recognition is presumed to have been paid).

21. *See, e.g.*, Bielunski v. Tousignant, 17 Ill. App. 2d 359, 149 N.E.2d 801 (2d Dist. 1958) (bailee presumed negligent for goods damaged while in bailment); Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 237 N.E.2d 732 (1st Dist. 1968) (proof of ownership and that vehicle was not operated by owner raises presumption that agent was driving vehicle).

22. *See, e.g.*, Breznik v. Braun, 11 Ill. 2d 564, 144 N.E.2d 586 (1957) (where a name appears in several different documents the identity of the named party is presumed to be the same); Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N.E. 410 (1896) (mail presumption).

23. *See, e.g.*, Howard v. People, 193 Ill. 615, 61 N.E. 1016 (1901) (presumption that possession of a chattel assumes ownership in order to promote stability of title); Orthwein v. Thomas, 127 Ill. 554, 21 N.E. 430 (1889) (presumption of legitimacy for children born of a married woman to avoid labeling child illegitimate).

24. Most presumptions actually exist for more than one reason. The mail presumption, for instance, is based not only on probability of delivery but also on the difficulty of proving receipt. MCCORMICK, *supra* note 1, § 343 at 807-08.

25. *See, e.g.*, Donovan v. Major, 253 Ill. 179, 97 N.E. 231 (1911). The *Donovan* court recognized that a presumption of death existed after seven years unexplained absence. The presumption was necessary to determine when death occurs "in order that rights depending upon the life or death of persons long absent and unheard of may be settled by some certain rule." *Id.* at 182, 97 N.E. at 232, *quoting* Whiting v. Nicoll, 46 Ill. 230 (1867).

26. *See, e.g.*, Bielunski v. Tousignant, 17 Ill. App. 2d 359, 149 N.E.2d 801 (2d Dist. 1958). In *Bielunski*, the court found that the bailee had the best access to information concerning the cause of the damage to the bailor's goods. It felt that this justified the use of a presumption that a bailee was negligent for any damages occurring to bailed goods while in the bailee's possession. *Id.* at 363, 149 N.E.2d at 804.

27. *See, e.g.*, People *ex rel.* Gonzalez v. Monroe, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2d Dist. 1963). The *Gonzalez* court stated that the legitimacy presumption "was conceived for the purpose of preserving family stability and protecting helpless infants from the stigma of illegitimacy." *Id.* at 6, 192 N.E.2d at 693.

28. *See, e.g.*, Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 158, 45 N.E. 410, 413 (1896).

reasoning process, whereby he or she draws conclusions from one fact as to the existence of other facts[29] based upon experience, reason and probability.[30] Inferences are totally permissive conclusions. On the basis of Fact *A* one person might infer Fact *B*, while another person, with a different series of experiences, might infer Fact *C*.[31] In the insurance example, if proof of due mailing did not raise a presumption of receipt, then a person with a negative experience with the mail service might infer that the premium was never received by the insurance company. Presumptions and inferences are distinct because "to prescribe a certain legal equivalence of facts, is a very different thing from merely allowing meaning to be given to them."[32]

Substantive rules of law have been referred to erroneously as irrebuttable or conclusive presumptions.[33] Like presumptions, substantive rules of law are mandatory connections between facts;[34] but unlike presumptions, substantive rules of law can never be rebutted by the introduction of contrary evidence.[35] Equating substantive rules of law with presumptions will have no consequence in a case in which the presumption's opponent has not introduced any evidence contrary to the presumption. In that instance, the presumption functions similarly to a substantive rule of law in that it authorizes a directed verdict on the issue.[36] This similar function may tempt courts to place both within the same category. However, a distinct treatment is necessary to insure that a presumption which has been overcome by contrary evidence will not authorize a directed verdict.[37]

The concepts of inference, presumptions, and substantive rules of law have been described as a continuum.[38] For example, James Thayer reported that the rule of adverse possession began as an inference.[39] At one time, an open, notorious and unexplained possession for twenty years gave rise to a mere inference of title.[40] Then a

29. *See* Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 391-92 (1956).

30. MCCORMICK, *supra* note 1, § 342 at 803-04.

31. *See* Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 391-92 (1956).

32. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 149 (1889).

33. *See, e.g.*, Maskaliunas v. Chicago & W. Ind. R.R., 318 Ill. 142, 149, 149 N.E. 23, 26 (1925) (rule that children under seven are incapable of negligence stated as a conclusive presumption). *See* CLEARY *supra* note 4, at 61-62; MCCORMICK, *supra* note 1, § 342 at 804.

34. MCCORMICK, *supra* note 1, 342 at 804.

35. *See, e.g.*, McDonald v. City of Spring Valley, 285 Ill. 52, 120 N.E. 476 (1918) (no evidence allowed to rebut presumption that child less than seven is incapable of negligence).

36. *See, e.g.*, Paulsen v. Cochfield, 278 Ill. App. 596, 604 (2d Dist. 1935) (presumption of agency).

37. WIGMORE, *supra* note 3, at § 2492.

38. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 149-50 (1889).

39. *Id.* at 150.

40. For a general discussion of the law of adverse possession *see* C. SMITH, SURVEY OF THE LAW OF PROPERTY 155-70 (2d ed. 1971).

presumption developed and finally a substantive rule of law emerged.[41] With substantive law developing in this manner, it is not surprising that a reading of the case law might produce uncertainty over whether the courts were applying an inference, a presumption, or a rule of law.

An additional difference between these concepts that indicates a need for a separate treatment is the manner in which each operates within the course of a trial. An available substantive rule of law alone may be sufficient to enable a party to meet his or her burden of proof. For instance, in a negligence suit, evidence that a child was less than seven years old when hit by a car automatically and conclusively establishes that the child lacked the capacity to be contributorily negligent.[42] In the absence of direct evidence, a party may introduce circumstantial evidence.[43] In that case, the factfinder may conclude or draw the inference that a particular Fact *B* is the probable and reasonable result of the existence of Fact *A* in order to find that a party has satisfied a particular burden of proof.

Where neither direct nor circumstantial evidence is available, however, a party may prove an issue only if a presumption intercedes.[44] The presumption creates a prima facie[45] case as to that issue. Thereafter, the opposing party must introduce contrary evidence in order to avoid a directed verdict, unless other issues of fact, not involving the presumption, require the case to go to the jury.[46] If the case

41. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 150 (1889).

42. *See, e.g.*, Dickeson v. Baltimore & Ohio Chi. R.R., 42 Ill.2d 103, 245 N.E.2d 762 (1969).

43. Circumstantial evidence is defined as evidence which,

> refers to facts indirectly related to the fact in issue, these circumstances having been found by experience so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion. For example, when foot prints are discovered subsequent to a recent snow, it is proper to infer that some animated being passed over the snow after it fell. . . .

JONES, *supra* note 14, § 1.3 at 4. *See* Ohio Bldg. Safety Vault Co. v. Industrial Bd., 227 Ill. 96, 110, 115 N.E. 149, 154 (1917).

44. *Compare* Lohr v. Barkman Cartage Co., 335 Ill. 335, 340, 167 N.E. 35, 37 (1929) *with* McElroy v. Force, 38 Ill. 2d 528, 532, 232 N.E.2d 708, 710 (1967). In *Lohr* the court stated that a presumption is used when no evidence exists, while in *McElroy* the court cited with approval Robinson v. Workman, 9 Ill. 2d 420, 137 N.E.2d 504 (1956) where the presumption was utilized although there was circumstantial evidence to support the presumed fact's existence.

45. Two different meanings have been given to the term "prima facie case." One definition proposes that there is enough evidence introduced to set out each element of the cause of action and to withstand a directed verdict. Under this meaning, a prima facie case means that the burden of production has been met. Under the second definition, the term means that the evidence is sufficient to shift the ultimate burden of persuasion. The former definition is utilized for the purposes of this Comment. MCCORMICK, *supra* note 1, § 342 at 803; WIGMORE, *supra* note 3, § 2494.

46. MCCORMICK, *supra* note 1, § 342 at 803.

goes to the jury, the court instructs the jurors that if they find that the basic facts giving rise to the presumption have been proven, then the presumed fact must also exist.[47]

Considerable debate exists on the quantum of evidence which is necessary to overcome a presumption and on the issue of what occurs when contrary evidence is introduced.[48] Four theories have been formulated to explain the procedural effects of presumptions where evidence contrary to the presumption has been introduced. They are: 1) the Thayer or bursting bubble theory,[49] 2) the modified bursting bubble theory,[50] 3) the Morgan or Pennsylvania theory,[51] and 4) the presumption-by-presumption theory.[52] These theories differ in the amount of evidence necessary to overcome the presumption, the presumption's effect on the burden of proof, and the type of instruction, if any, to be given concerning the presumption. An analysis of each major theory will illustrate the differences.

John Thayer's 1889 work[53] represents the starting point for an analysis of the procedural effect attributed to presumptions. Thayer

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47. *See, e.g.*, McElroy v. Force, 38 Ill. 2d 528, 232 N.E.2d 708 (1967) (owner of vehicle presumed to have driven vehicle); Dunne v. South Shore Country Club, 230 Ill. App. 11 (1st Dist. 1923) (failure to deliver bailed good raised presumption of negligence).

48. The basic works which explore the procedural effects of presumptions include: THAYER, *supra* note 14; Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931) [hereinafter cited as *Observations*]; and Bohlen, *supra* note 1.

49. The bursting bubble theory was developed by Professor James Thayer, but has been elaborated upon by Dean Wigmore.

50. Morgan was the first to recognize the existence of seven patterns of departure from the bursting bubble theory. He noted that where there was evidence sufficient to support a finding of the nonexistence of the presumption, some courts have required that that evidence be credited by the trier of fact. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 34 (1963). Although this deviation has proven to be widely employed by Illinois courts, no one name has been given to it. For ease of understanding, this approach will be referred to in this Comment as the "modified bursting bubble theory."

51. In an early work Morgan approved Bohlen's presumption-by-presumption theory discussed at notes 73-77 and accompanying text *infra*. *Observations*, *supra* note 48, at 928. However, he later rejected that theory as impractical and advocated the Pennsylvania theory which now bears his name. Morgan, *Presumptions*, 12 WASH. L. REV. 275 (1937); MCCORMICK, *supra* note 1, § 345 at 826-27. Because of certain constitutional arguments against that approach, he conceded that the Thayer theory would probably remain the majority approach and accepted the modified versions of that theory as expressed in ALI MODEL CODE OF EVIDENCE rules 703 and 704 (1942). *See* Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245, 265 (1943). He later urged the adoption of a modified version of the modified Pennsylvania theory. UNIFORM RULES OF EVIDENCE rule 14 (1953). *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 81 (1956).

52. *See* Comment, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PENN. L. REV. 307 (1920).

53. THAYER, *supra* note 14.

reasoned that presumptions were created solely as replacements for evidence and that the availability of evidence on an issue eliminated the need for the presumption.[54] Under this theory, proof of the basic facts creates a prima facie case which shifts the burden of production to the opponent but has no effect on the burden of persuasion.[55] Accordingly, under this view, a presumption operates only until the presumption's opponent meets his or her burden of proof by introducing evidence sufficient to support a finding of the nonexistence of the presumed fact.[56] At that point the presumption is conclusively rebutted.

The judge determines whether the evidence offered to contradict the presumption is sufficient for that purpose.[57] Regardless of whether the judge considers the evidence credible, he or she must decide whether the evidence would support a verdict contrary to the presumption, were the jury to believe it.[58] In this case, the opponent's burden of proof has been met and the presumption disappears. No instruction regarding the presumption will be given.[59]

Some courts have modified the bursting bubble theory in a significant respect, holding that the presumption is overcome only by evidence that is reliable in nature and uncontradicted by direct or circumstantial evidence.[60] Like the Thayer theory, the "modified bursting bubble theory"[61] recognizes that while the burden of production shifts once the presumption is raised, the burden of persuasion remains fixed.[62] However, unlike the bursting bubble theory,

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54. *Id.* at 339.

55. *Id.* at 337.

56. Courts do not clearly define what quantum of evidence is necessary. Some indicate that any evidence introduced will suffice. *See, e.g.*, Coal Creek Drainage & Levee Dist. v. Sanitary Dist., 336 Ill. 11, 31, 167 N.E. 807, 816 (1929) (as soon as evidence is introduced the presumption vanishes). Others note that only believable evidence should rebut the presumption. *See, e.g.*, Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 77, 237 N.E.2d 732, 740 (1st Dist. 1968) (denial of directed verdict for defendant affirmed).

57. *See* THAYER, *supra* note 14, at 337-39.

58. *See* Kitch v. Adkins, 346 Ill. App. 342, 105 N.E. 527 (3d Dist. 1952). Presumptions establish a prima facie case which shifts the burden of production to the opposing party. This is the test utilized whenever a directed verdict is at issue. It is appropriate because the determination that the party opposing the presumption has satisfied his or her burden of production is raised by a motion for directed verdict. Paulsen v. Cochfield, 278 Ill. App. 596 (2d Dist. 1935).

59. *See, e.g.*, Wolf v. Pedian, 251 Ill. App. 564 (1st Dist. 1929) (bailee presumption).

60. *See, e.g.*, Kavale v. Morton Salt Co., 329 Ill. 445, 160 N.E. 752 (1928) (defendant's motion for directed verdict was denied and case sent to the jury despite introduction of evidence); Blodgett v. State Mut. Life Assurance Co., 32 Ill. App. 2d 155, 177 N.E.2d 1 (2d Dist. 1961) (presumption was not overcome as a matter of law although rebuttal evidence was offered).

61. *See* note 50 *supra*.

62. *See* Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 79, 237 N.E.2d 732, 737 (1st Dist. 1968). *See also Observations, supra* note 48, at 916.

the modified theory usually reserves the question of whether the presumption is overcome for the jury.[63] Because the jury considers the credibility of the evidence heard during the trial, rebuttal evidence which the jury disbelieves does not overcome the presumption.[64] The jury is instructed that if they find that the basic facts have been proven, a presumption will be raised which may be successfully rebutted by the introduction of credible evidence.[65]

A third theory, developed by Professor Morgan, suggests that presumptions should be given a stronger procedural effect than that ascribed by either of the bursting bubble theories.[66] Relying on the important considerations underlying the creation of a presumption,[67] his theory provides that a presumption persists unless the opposing party proves the nonexistence of the presumed fact by a preponderance of the evidence.[68] Consequently, the presumption shifts not only the burden of production but also the burden of persuasion.

This result can be justified easily. The original allocation of proof between the parties is set by a court to promote the same goals which underlie the creation of presumptions.[69] Presumptions are needed when the original allocation of proof is inadequate to fulfill these ends. Since common goals are furthered, the allocation of the burden of persuasion under the Morgan theory is not inappropriate.[70] Under this theory, instructions are always necessary to inform the jury of the presumption's existence and its rebuttable nature,[71] because it is the

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63. It is possible for a judge to determine that the rebuttal evidence is reliable as a matter of law because reasonable minds would not differ on that issue. *See, e.g.*, Paulsen v. Cochfield, 278 Ill. App. 596 (2d Dist. 1935).

64. *See* Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 76, 237 N.E.2d 732, 737 (1st Dist. 1968) *quoting*, Paulsen v. Cochfield, 278 Ill. App. 596, 607 (2d Dist. 1935).

65. 96 Ill. App. 2d at 78-79, 237 N.E.2d at 737. Although it mistakenly viewed an inference as a presumption, the court in *Horst* did utilize the modified bursting bubble approach in its application of the instruction.

66. *See* note 51 *supra*.

67. *See* notes 20-28 and accompanying text *supra*.

68. Morgan, *Presumptions*, 12 WASH. L. REV. 275, 281 (1937); *See also* Comment, *Presumptions in Civil Cases: Procedural Effects Under Maryland Law in State and Federal Forums*, 5 BALT. L. REV. 301, 307 (1976).

69. MCCORMICK, *supra* note 1, § 343 at 806; *Observations*, *supra* note 52, at 929.

70. As Professor McCormick noted:

> The principal objection to . . . [shifting the allocation of the burden of proof] has been that it requires a "shift" in the burden of persuasion, something that is, by definition of the burden, impossible. The argument, however, assumes that the burden of persuasion is fixed at the commencement of the action. This is simply not the case. As we have seen, the burden of persuasion need not finally be assigned until the case is ready to go to the jury.

MCCORMICK, *supra* note 1, § 345 at 826-27.

71. *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 81 (1956).

jury's province to decide whether the presumed fact still exists after the introduction of the contrary evidence.

The fourth theory concerning the procedural effect of presumptions is called the presumption-by-presumption theory.[72] It is similar to Morgan's approach in that it awards procedural effect based on the policy reasons underlying presumptions.[73] However, this theory assigns the procedural effect to a particular presumption in accordance with the importance attached to its purpose.[74] Generally, convenience and fairness considerations are viewed as less important than probability or social considerations.[75] Thus, the former are less likely to require evidence that is credible or uncontradicted to overcome the presumption. Under this approach, some presumptions will be destroyed by any contrary evidence, others by believable evidence and still others by proof that is more probable than not.[76] The variety of procedural effects utilized obviously will be evidenced by a variety of instructions.[77]

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72. *See* note 52 *supra*.

73. Bohlen, *supra* note 1, at 313. Thayer acknowledged that presumptions exist for a variety of reasons but his theory does not reflect these different purposes because it accords all presumptions the same procedural effect. THAYER, *supra* note 14, at 314.

74. Bohlen, *supra* note 1, at 313-21.

75. Professor Morgan has suggested in his early work that the considerations underlying presumptions must be balanced against any pleading considerations. Presumptions based on probability which are raised in a case where there are counteracting considerations of inconvenience or policy should only provide a prima facie case. All other presumptions at least should have the effect of being rebutted by evidence which is actually rated by the jury. This would mean that the presumption's purpose would not be sacrificed because of evidence which no trier of fact would believe. In other instances, the nonexistence of the presumed fact should be proved by requiring the presumption's opponent to carry the burden of persuasion on that issue. The burden of persuasion should be allocated to the presumption's opponent: 1) where the presumption is based on probability and no convenience or policy considerations exist; 2) where a convenience based presumption is not countered by a policy consideration; 3) where a socially desirable presumption exists; and 4) where two or more presumptions exist in a party's favor. *Observations,* note 48 *supra*, at 924-34.

76. *See, e.g.*, Bond v. St. Louis-San Francisco Ry., 315 Mo. 987, 288 S.W. 777 (1926). The *Bond* court determined that the doctrine of *res ipsa loquitur* as applied when the defendant is a common carrier was based on the public policy of the state to protect passengers. *Id.* at 1003, 288 S.W. at 783. Having made this determination, the court held the rule in some presumption cases that the burden of persuasion did not shift when a presumption was raised inappropriately. *Id.* Instead, the court shifted the burden of persuasion which it erroneously termed the burden of proof. The court seemed to imply that it was possible that presumptions could have divergent effects. Thus the court accepted the presumption-by-presumption approach although not by name. The court stated that if a presumption was "a mere rule of procedure, then when all the evidence is in it would be proper to instruct the jury that the burden is upon the plaintiff to show by the greater weight of the evidence that the defendant was negligent." *Id.*

77. Although it should be obvious that instructions are the practical example of the implementation of presumptions, courts have made the mistake of assigning one effect to a case and then granting an instruction which is inconsistent with that effect. *See* notes 99-101 and accompanying text *infra*.

In order to illustrate these theories, it will be helpful to reconsider the insurance policy situation. The plaintiff raises the presumption that the premium was received by the defendant insurance company by introducing evidence of proper mailing of the premium check. Under the various presumption theories, different results will occur if the defendant company brings in the mail clerk to deny receipt of the premium. Under the bursting bubble theory this evidence will be sufficient to conclusively rebut the presumption. Because the mail clerk's testimony is probably inherently incredible, the modified bursting bubble theory would leave this issue for the jury to determine. Morgan would also send the question of rebuttal to the jury but thereafter the presumption would remain in the case unless it was found by the jury to be false by a preponderance of the evidence. Under the presumption-by-presumption approach, the court would inquire into the purpose of the presumption and find that the presumption was based upon considerations of probability and fairness. Consequently, the presumption probably would not disappear when the defendant introduced incredible, self-serving testimony. Rather, the court would hold that the presumption can only be destroyed by evidence which is credible and uncontradicted.[78]

II. Past Illinois Experience with Presumptions

Illinois cases reflet neither clear nor consistent treatment of presumptions. These decisions illustrate the type of confusion generated from the lack of precise terminology and analysis. For instance, in *Ohio Vault Building Safety Co. v. Industrial Board,*[79] the Illinois Supreme Court found that inferences and presumptions were synonomous and, accordingly, awarded them similar treatment.[80] Although the case actually involved the use of an inference, the court's real failure was that it did not perceive the permissive character of inferences in contrast to the mandatory nature of presumptions.[81] Other decisions do not explicitly accept the *Ohio Vault* position, but nevertheless mistake inferences for presumptions.[82]

78. *See, e.g.*, Talmage v. Union Cent. Life Ins. Co., 315 Ill. App. 623, 43 N.E.2d 575 (1st Dist. 1942).

79. 277 Ill. 96, 115 N.E. 149 (1917).

80. *Id.* at 110-11, 115 N.E. at 155.

81. *See* notes 29-32 and accompanying text *supra*.

82. *See, e.g.*, Shelvin v. Jackson, 5 Ill. 2d 43, 124 N.E.2d 895 (1955) (presumption of sanity); Tepper v. Campo, 398 Ill. 496, 76 N.E.2d 490 (1948) (presumption that the failure to produce evidence at trial implies the absence of available evidence); Coal Creek Drainage Dist. v. Sanitary Dist., 336 Ill. 11, 167 N.E. 807 (1929) (presumption that once a condition has been proven to exist at one point in time it will continue to exist in the future).

Even those decisions which do recognize the conceptual distinction between inferences and presumptions have not abandoned the position that inferences are included within the term "presumption."[83] For example, in *Cobb v. Marshall Field & Co.*,[84] the appellate court was faced with the question of whether the doctrine of *res ipsa loquitur* existed as an inference or a presumption. It concluded that an "inference of negligence," instead of a presumption, arose from the introduction of circumstantial evidence, but the court continued to call the inference a presumption.[85] Admittedly, the *Cobb* decision is consistent with one now discredited distinction: that an inference was a presumption of fact and that the other was a presumption of law.[86] However, this approach has been rejected in favor of the use of separate terms in order to promote clarity.[87] If separate terms are used, it is suggested, courts will not be tempted to combine the functions of these two concepts.

Because of decisions like *Ohio Vault* and *Cobb*, courts have trouble ascertaining whether an inference, presumption or substantive rule of law has been raised. As a result, courts often place themselves in the untenable position of having to apply presumption law to what is actually an inference. In addition, because inferences are often called presumptions, much of the case law which emerges suggests the procedural effect for inferences, not presumptions. Under this circumstance, a judge might find a true presumption difficult to implement properly.[88]

In addition, courts exhibit a general lack of detailed analysis.[89] Some decisions rely upon dicta, demonstrating no effort by the courts

83. *Compare* Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (1907) (court cautioned against including inference within presumption category) *with* Cobb v. Marshall Field & Co., 22 Ill. App. 2d 143, 159 N.E.2d 520 (1st Dist. 1959).

84. 22 Ill. App. 2d 143, 159 N.E.2d 520 (1st Dist 1959).

85. *Id.* at 155, 159 N.E.2d at 525.

86. *See* THAYER, *supra* note 14, at 339. *See generally* Bohlen, *supra* note 1.

87. Modern commentators usually reject this concept because "in most instances, the application of any label to an inference will only cause confusion." *See* 1 JONES, *supra* note 14, § 3.2 at 128. MCCORMICK, *supra* note 1, § 342 at 804. Interestingly, Professor McCormick once held the position that presumptions should be considered in terms of mandatory and permissive presumptions, but now rejects that position. MCCORMICK, *supra* note 1, § 342 at 804 n.31.

88. *See, e.g.*, Graves v. Colwell, 90 Ill. 612 (1878).

89. *See, e.g.*, Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930) *overruled*, Metz v. Central Ill. Elec. & Gas Co., 32 Ill. 2d 446, 207 N.E.2d 305 (1965). This is a serious defect. Courts must present authority for their decisions because "all official power can properly be thought of as limited by a general prohibition against arbitrariness in its exercise." H. HART & A. SACHS, THE LEGAL PROCESS 175 (1953). In the absence of a record of the considerations relied upon by a court, this prohibition against arbitrariness is difficult to administer. Generally, courts are under the obligation to use reasoned elaboration. This means,

> first of all, that the magistrate is obliged to resolve the issue before him on the assumption that the answer will be the same in all like cases. . . . Secondly, the

to direct an inquiry at the particular presumption under the particular fact situation.[90] Other courts do distinguish the particular presumption from other presumptions but fail to explain the reasoning behind the distinction.[91]

Res ipsa loquitur cases illustrate both situations.[92] In *Bollenbach v. Bloomenthal*,[93] the 1930 Illinois Supreme Court relied upon the general body of presumption law, including dicta, to conclude that the presumption was rebutted by the introduction of contrary evidence.[94] The court did not inquire whether *res ipsa* was in fact a presumption rather than an inference. However, assuming the validity of the characterization, the court did not decide whether, *res ipsa* warranted the same procedural effect found appropriate for other presumptions.

In 1965, *Metz v. Central Illinois Electric and Gas Co.*,[95] overruled *Bollenbach*. There, the state supreme court concluded that the prima facie case of negligence created by *res ipsa* did not disappear when contrary evidence was introduced. Rather, the jury was required to weigh all of the evidence to determine whether in fact the prima facie case was overcome. The court asserted that this result was "just" but did not explain why.[96] Had it analyzed the doctrine involved, it might have accepted the *Cobb* court's conclusion that *res ipsa loquitur* arose as an inference.[97] This distinction would have been consistent with the court's treatment in *Metz*, because the court held that the jury was to evaluate the probative value of the circumstantial evidence, which is the precise manner in which any inference should be treated.[98]

A further weakness in Illinois presumption decisions is that they often are internally inconsistent. *Graves v. Colwell*,[99] an early pre-

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magistrate is obliged to relate his decision in some reasoned fashion. . . . He is not to think of himself as in the same position as a legislator. . . .

Id. at 161. In addition, because decisional law is directive in nature in that it speaks to the future, decisions must clearly state the court's reasoning as a guide to future courts. The *Diederich* decision is inadequate in this respect.

90. *See, e.g.*, Lohr v. Barkmann Cartage Co., 335 Ill. 335, 167 N.E. 35 (1929).

91. *See, e.g.*, Metz v. Central Ill. Elec. & Gas Co., 32 Ill. 2d 446, 207 N.E.2d 305 (1965).

92. For a general discussion of the doctrine of *res ipsa loquitur* see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 211-35 (4th ed. 1971).

93. 341 Ill. 539, 173 N.E. 670 (1930).

94. *Id.* at 548, 173 N.E. at 673.

95. 32 Ill. 2d 446, 207 N.E.2d 305 (1965).

96. *Id.* at 449, 207 N.E.2d at 307.

97. *See* notes 84-85 and accompanying text *supra*.

98. *See, e.g.*, Marian v. Lena Pellett Co., 120 Ill. App.2d 131, 256 N.E.2d 93 (2d Dist. 1970).

99. 90 Ill. 612 (1898).

sumption case, affords probably the clearest example. *Graves* involved the issue of whether the name of a grantee on a deed referred to a father or son, whose names were the same. The court stated that a presumption existed that the father was the grantee and that the presumption could be rebutted by the introduction of contrary evidence.[100] Significantly, the implication was that the judge would make this determination as a matter of law. However, when the son introduced contrary evidence, the court approved an instruction which stated that in order to be successful the son's rebuttal evidence had to prove by a preponderance of the evidence that the deed was made to the son and not the father.[101]

III. *Diederich v. Walters:* THE CASE IN PERSPECTIVE

The Illinois Supreme Court recently was confronted with an opportunity to correct the past inadequacies in the presumption field in *Diederich v. Walters.*[102] Although the decision does represent an improvement over past decisions, *Diederich* did not meet the challenge it was offered: to provide a rational explanation for prior cases and a proper treatment of presumptions for the future. In addition, the court could have used *Diederich* to clarify the status of the child's presumption raised in the case.[103] In order to prompt a future decision that will end the confusion in presumption cases, it is important to indicate precisely where *Diederich* fell short.

Diederich involved a wrongful death action arising out of the death of a thirteen year old in a pedestrian-automobile accident.[104] The plaintiff, by producing evidence of the decedent's age at the time of his death, raised the presumption that a child between the ages of seven and fourteen lacks the capacity to be negligent.[105] Because

100. *Id.* at 615.

101. *Id.* at 618.

102. 65 Ill. 2d 95, 357 N.E.2d 1128 (1976).

103. As an indication of the need for reform *compare* American Natl. Bank v. Pennsylvania R.R., 52 Ill. App. 2d 406, 202 N.E.2d 79 (1st Dist. 1965) (an instruction was necessary so that the jury could determine whether the introduction of evidence of the child's capacity had conclusively rebutted the presumption) *with* Strasma v. Lemke, vol. 111 Ill. App. 2d 377, 250 N.E.2d 305 (1st Dist. 1969) (the presumption may be overcome by evidence of the child's conduct if the jury is instructed to consider the mental capacity and experience of the child in determining whether the child's conduct was negligent.

104. Richard Diederich and two school friends were walking along a dimly lit rural highway on the way to a school dance when the accident occurred. The trio had been walking with the traffic on the road, stepping off to the side of the road whenever an infrequent car passed. Young Diederich did not move off the road as defendant's car approached and was consequently struck and killed by defendant's automobile. 65 Ill. 2d at 97-98, 357 N.E.2d at 1129.

105. This presumption is one of three rules utilized by Illinois courts to afford special treatment to children. All of these rules stem from the criminal law concept that age is a valid factor

the presumption established the plaintiff's prima facie case on the issue of due care, he sought a jury instruction that the presumption was in operation.[106]

In affirming the trial court's refusal to permit the instruction as to the presumption,[107] the Illinois Supreme Court reviewed two of the available theories that designate the procedural effect of presumptions.[108] Although the court acknowledged the Morgan theory, it

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for gauging the capacity of children. Three age classifications exist: children below the age of seven are held incapable of negligence as a matter of law; children between the ages of seven and fourteen are rebuttably presumed to be incapable; and children over the age of fourteen are rebuttably presumed capable. *See* Mackaliunas v. Chicago & W. Ind. R.R., 318 Ill. 142, 149 N.E. 23 (1925). *See generally* Note, *Contributory Negligence of Children*, 18 S.C. L. REV. 648 (1966); Note, *Torts—Minors—Contributory or Comparative Negligence*, 39 TENN. L. REV. 747 (1972). For the purpose of this Comment, the presumption involved in *Diederich* will be referred to as the child's presumption.

106. The plaintiff's instruction stated: "Since the decedent, Richard Diederich, was under the age of 14 at the time of the occurrence, there is a presumption that he was free from contributory negligence." 65 Ill. 2d at 99, 357 N.E.2d at 1130.

107. 65 Ill. 2d at 103, 357 N.E.2d at 1132. The trial court rejected the plaintiff's instruction and sent the issue to the jury without the benefit of the presumption. The use of a presumption instruction, it held, was inconsistent with the defendant's introduction of evidence to prove negligence. *Id.* at 103, 357 N.E.2d at 1132. The court did tender two instructions concerning the decedent's contributory negligence. The court stated:

> A minor is not held to the same standard of conduct as an adult. When I use the words "ordinary care" with respect to the decedent, I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of the decedent would use under circumstances similar to those shown by the evidence. The law does not say how such a minor would act under those circumstances. That is for you to decide.
>
> The rule I have just stated also applies when a minor is charged with having violated a statute. There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided:
>
> (a) Any person walking along and upon improved highways shall keep on the left of the paved portion or on the left shoulder thereof and upon meeting a vehicle while walking on such paved portion shall step off to the left.
>
> If you decide that the plaintiff's decedent violated the statute on the occasion in question, then you may consider that fact together with all other facts and circumstances in evidence in determining whether or not the plaintiff's decedent was contributorily negligent before and at the time of the occurrence.

Id. at 99-100, 357 N.E.2d at 1130.

The appellate court had reversed the trial court on the basis that the instruction on the ordinary care of the minor was inadequate to inform the jury of the contributory negligence presumption. Citing past Illinois decisions dealing with this presumption, the court concluded that a finding of negligence was not adequate to rebut the presumption. Rather, evidence of the child's capacity and intelligence was necessary for that purpose. Diederich v. Walters, 31 Ill. App. 3d 594, 334 N.E.2d 283 (2d Dist. 1975).

108. The court referred to Jones and Wigmore, noted evidence text writers, to establish the existence of two major approaches to presumptions. 1 JONES, *supra* note 14, § 3.8; 9 WIGMORE, *supra* note 3, § 2491 at 289. For a discussion of the procedural effects in the presumption field *see* MCCORMICK, *supra* note 1, at 822; Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 333 (1952).

concluded that the majority or bursting bubble theory was consistent with both the trial court's ruling and past Illinois decisions.[109] In so doing, the court did not explicitly hold that the bursting bubble theory should govern all presumptions, but the court's language and its failure to focus solely on the child's presumption supports the conclusion that it was rendering a general rule for Illinois presumptions. The court stated that a trial judge has discretion on the issue of whether to instruct the jury as to the existence of a presumption; and because the court found no clear cut abuse of discretion, it affirmed the lower court's decision.[110]

Although *Diederich's* analysis is more thorough than other decisions, the court failed to discuss all the available procedural effects.[111] Moreover, the opinion may have compounded previous problems. First, by stating that "the prevailing view that a presumption ceases to operate in the face of contrary evidence has generally been followed in Illinois,"[112] the court impliedly accepted the bursting bubble theory for all presumptions. The court cited numerous decisions for the proposition that a presumption is destroyed by any evidence introduced to contradict the presumed fact.[113] However, the court did not carefully analyze these cases. Specifically, the court failed to discern that several of the decisions involved inferences[114] rather than true presumptions. The court further failed to note that the language in all but three of these cases,[115] referring to the pre-

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109. The court supported its conclusion that Illinois accepted the majority view by extracting statements from a number of Illinois decisions that reviewed the use of presumptions. 65 Ill. 2d at 102-03, 357 N.E.2d at 1131-32.

110. *Id.* at 100, 357 N.E.2d at 1130. The court stated:

> The determination of whether a jury should be instructed as to the existence of a presumption must be made by a trial court in the context of the facts and circumstances of each case with reference to the applicable law, the evidence, other instructions, and the particular nature and effect of the presumption itself.

111. The *Diederich* court mentioned the bursting bubble and Morgan theories, referring to them as the majority and minority theories in this area. Past Illinois courts have discussed only the bursting bubble theory. No cases have recognized the existence of all other theories reviewed in this Comment. Nevertheless, the cases have permitted the procedural effects suggested by these theories.

112. 65 Ill. 2d at 102, 357 N.E.2d at 1131.

113. *Id.* The cases discussed in *Diederich* are collected in notes 114-116 *infra.*

114. *See* Miller v. Pettengill, 392 Ill. 117, 63 N.E.2d 735 (1945); Coal Creek Drainage & Levee Dist. v. Sanitary Dist., 336 Ill. 11, 167 N.E. 807 (1929).

Justice Goldenhersh, in his dissent, rejected the majority's reliance on the cited cases because they involved a variety of presumptions. He noted that the majority erred because it "attempted to apply the same rule to all presumptions whereas it is clear from the decisions of this court that all presumptions are not alike." 65 Ill. 2d at 106, 257 N.E.2d at 1132.

115. Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930) (uncontradicted testimony); Lohr v. Barkman Cartage Co., 335 Ill. 335, 167 N.E. 35 (1929) (uncontradicted evi-

sumption's appropriate procedural effect, constituted dicta because the outcome did not rest upon procedural effect.[116]

By advocating the use of the majority theory for Illinois presumptions, *Diederich* failed to recognize and accommodate the diversity of procedural effects utilized in prior Illinois decisions. For instance, in one prior case,[117] although the opposing party introduced contrary evidence, the judge did not find that the presumption had been overcome as a matter of law.[118] Rather, the court reasoned that because of the material contradictions in the testimony, the question of rebuttal was an issue of fact for the jury.[119] The judge explained that the jury was "not required to believe such witness even though such contradiction of his testimony has not been direct."[120] The court implied that the presumption would remain effective unless evidence had been introduced which the jury believed. The court's approach was consistent with the modified bursting bubble theory and not Thayer's version. Had the court strictly applied the Thayer theory, the presumption would have disappeared from the case after the introduction of any contrary evidence.

In a later case,[121] an appellate court employed the procedural effect suggested by Morgan in lieu of the bursting bubble approach.

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dence); Osborne v. Osborne, 325 Ill. 229, 156 N.E. 306 (1927) (inherently reliable divorce decree offered as rebuttal evidence).

116. Questions of the existence of a presumption after the introduction of contrary evidence arise in the context of motions for directed verdict and validity of jury instructions. Discussions of presumptions in other contexts constitute dicta. In citing the following cases the *Diederich* court was relying on dicta. McElroy v. Force, 38 Ill. 2d 528, 232 N.E. 2d 708 (1967) (no rebuttal evidence); Trustees of Schools v. Lilly, 373 Ill. 431, 26 N.E.2d 489 (1940) (no rebuttal evidence); Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928) (rebuttal evidence was only contradicted by self-serving testimony of party promoting the presumption); Johnson v. Pendergast, 308 Ill. 255, 139 N.E. 407 (1923) (self-serving rebuttal evidence existed, but decision was unclear on question of whether this rebutted the presumption or not); Morrison v. Flowers, 308 Ill. 189, 139 N.E. 10 (1923) (no rebuttal evidence); Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N.E. 897 (1908) (self-serving testimony).

117. Kavale v. Morton Salt Co., 329 Ill. 445, 160 N.E. 752 (1928). *Kavale* involved the presumption that a vehicle is presumed to have been operated by an agent of the owner of the vehicle even though the owner was not operating the vehicle at the time of the accident. This presumption is raised upon proof of ownership. *See, e.g.*, McElroy v. Force, 38 Ill. 2d 528, 232 N.E.2d 708 (1967).

118. 329 Ill. at 451, 160 N.E. at 754.

119. *Id.* at 452, 160 N.E. at 754.

120. *Id.*

121. Brenton v. Sloan's United Storage & Van Co., 315 Ill. App. 278, 42 N.E.2d 945 (4th Dist. 1942). In *Brenton* the plaintiffs sought recovery for damages to furniture and household goods which, while held in bailment by the defendant, were destroyed in a fire. This fact raised the presumption that the bailee's negligence caused the damage. The defendant bailee testified that he had no knowledge of the cause of the fire which damaged the plaintiff's goods and that fire precautions had been taken by the storage company prior to the fire. The court found that the jury was not incorrect in determining that such a showing did not overcome the presump-

The court held that a presumption existed in the case which placed a burden on the defendant to explain the circumstances surrounding the loss of the plaintiff's goods while held in bailment by the defendant.[122] The court reasoned that the presumption should remain in effect until the "defendant has shown by a preponderance of the evidence that it exercised ordinary care and diligence to prevent destruction and loss to the property"[123] owned by the plaintiff.

In a line of cases concerning the legitimacy of children, Illinois courts have deviated further from the bursting bubble approach.[124] In each of these cases, although contrary evidence was introduced which might have persuaded the jury, the courts refused to find that the presumption had been overcome unless clear and convincing evidence was offered.[125]

Even assuming that the bursting bubble theory suggested the proper procedural effect to use in *Diederich*, the supreme court incorrectly instructed courts as to how to use the theory. The court erred in two respects: first, by calling for a discretionary use of instructions; and second, by failing to establish guidelines for the exercise of this discretion. The *Diederich* decision suggested that trial courts look at the "facts and circumstances of each case with reference to the applicable law, the evidence, other instructions, and the particular nature and procedural effect of the presumption itself."[126] in order to

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tion. *Id.* at 283, 42 N.E.2d at 947. *See also* Miles v. International Hotel Co., 289 Ill. 320, 124 N.E. 599 (1919); Bielunski v. Tousignant, 17 Ill. App. 2d 359, 149 N.E.2d 801 (2nd Dist. 1958); Capital Dairy Co. v. All States Auto Body Builders, 339 Ill. App. 395, 90 N.E.2d 278 (1st Dist. 1950).

122. 315 Ill. App. at 283, 42 N.E.2d at 947.

123. *Id.*

124. *See* Orthwein v. Thomas, 127 Ill. 554, 21 N.E. 430 (1889); People *ex rel.* Jones v. Schmitt, 101 Ill. App. 2d 183, 242 N.E.2d 275 (3d Dist. 1968); People *ex rel.* Gonzalez v. Monroe, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2nd Dist. 1963).

125. These cases are exemplified by People *ex rel.* Gonzalez v. Monroe, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2d Dist. 1963), in which the plaintiff brought a paternity action against the defendant. In support of her allegation of paternity, she produced evidence that she and the defendant had been involved in an extra-marital sexual relationship at the time of the child's conception. The defendant introduced evidence that the plaintiff was married which raised the presumption that the child was legitimate. In rebuttal, the plaintiff testified that she had sexual relations with the defendant, but none with her husband, during the critical time frame. Her testimony was uncontradicted and inherently credible. The court, however, refused to find that this evidence rebutted the presumption. It reasoned that the legitimacy presumption was developed "for the purpose of preserving family stability and protecting helpless infants from the stigma of illegitimacy." *Id.* at 6, 192 N.E.2d at 693. Thus, the presumption was conclusive, but could be rebutted only by clear and convincing evidence. *Id.* Courts have found this presumption rebutted where the evidence shows the impossibility of the husband having been the father. *See, e.g.*, Robinson v. Ruprecht, 191 Ill. 424, 61 N.E. 631 (1901) (husband and wife lived apart and the wife believed that he was dead).

126. 65 Ill. 2d at 100, 357 N.E.2d at 1130.

determine what instruction, if any, to use once a presumption has been raised. This implies that trial courts should conduct an individualized presumption-by-presumption analysis. While this is a desirable approach because it focuses the analysis upon the particular case and encourages reasoned conclusions, the discretionary use of instructions suggested by *Diederich* is inconsistent with the bursting bubble theory adopted by the court.[127] Under that theory, the introduction of contrary evidence destroys the presumption and an instruction regarding the presumption would be improper.[128] On the other hand, where the presumption has not been overcome, an instruction is mandatory.[129]

Although the supreme court noted several factors[130] which should be analyzed when determining whether a presumption instruction should be given, it never explained the interrelationship of these factors. In addition, the court neglected to assign values to them or to give any indication as to whether some type of balancing test was necessary. Because the court has failed to set guidelines for this discretionary use of instructions, future courts have no indication of how to properly exercise this discretion.

The greatest flaw in the *Diederich* decision, however, results from the court's misapplication of the presumption raised by the plaintiff's evidence. *Diederich* recognized that the decedent's young age raised the presumption that he lacked the capacity for negligence.[131] Where a child lacks capacity the question of negligence never arises although the child might have acted in a manner which would otherwise be characterized as negligent.[132]

By focusing attention upon the general function of presumptions, the *Diederich* court did not analyze the nature of the child's presumption.[133] Because of this omission, it sustained the trial court's

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127. *Id.* at 102-103, 357 N.E.2d at 1131-32.

128. *See* note 59 and accompanying text *supra*. *See also* Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930) (an instruction was not proper where the defendant produced evidence contrary to the *res ipsa loquitur* presumption).

129. *See also* McElroy v. Force, 38 Ill. 2d 528, 232 N.E.2d 708 (1967) (where presumption was not rebutted, it was essential to inform the jury of the presumption).

130. *See* note 110 and accompanying text *supra*.

131. 65 Ill. 2d at 103, 357 N.E.2d at 1132. *See* note 105 *supra*.

132. *See generally* Note, *Contributory Negligence of Children* 18 S.C. L. REV. 648 (1966); Note, *Torts*—Minors—*Contributory or Comparative Negligence*, 39 TENN. L. REV. 747, 748-49 (1972).

133. This presumption was created because courts generally believe that children do not possess the same capacity as adults to recognize and avoid danger. *See, e.g.*, Chicago and Alton R.R. v. Backer, 76 Ill. 25 (1875). Although other courts had recognized the distinction between children's and adults' capacity in a criminal context, the Illinois Supreme Court in Wolczek v.

rebuttal of the presumption upon evidence that the decedent violated a traffic statute. Consequently, the court determined that young Diederich had been contributorily negligent without ever considering his individual capacity for negligence.[134]

IV. THE PRESUMPTION-BY-PRESUMPTION THEORY: A PROPOSAL FOR A MORE RATIONAL TREATMENT OF PRESUMPTIONS

Had the supreme court adopted the presumption-by-presumption approach, it would have alleviated the problems encountered both in *Diederich* and past decisions.[135] That theory represents the better approach because it directs the attention of the court away from pre-

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Public Serv., 342 Ill. 482, 174 N.E. 577 (1931), was the first court to establish the presumption in tort cases.

The plaintiff in *Wolczek*, an eleven year old, received an electric shock and burns when he climbed upon the defendant's high voltage electric line tower. The tower was located in an unguarded and unfenced forest preserve where children played. The court examined the child's testimony and highlighted the following points concerning the child's capacity: (1) he did not know the tower was dangerous, (2) he had not seen any signs warning him of the danger nor was he told by anyone of the dangerousness of the structure, (3) he did not know anything about electricity although he had ridden the electric street car.

The *Wolczek* court's reasoning for adopting this age-based presumption for negligence cases centered upon its concern for the child's lower level of experience, intelligence and understanding. It found that the special standard of care in Illinois did not insure enough consideration for the average child's deficiences. The court, noting that Illinois courts had expressed the policy of treating children between the ages of seven and fourteen in a special manner, implied that only the use of the presumption assured that treatment. *Id.* at 493, 174 N.E. at 582. For an excellent survey of the Illinois treatment of children's contributory negligence. *See* Annot., 174 A.L.R. 1080, 1111 (1948).

When this presumption is raised, two separate issues of fact exist: capacity and negligence. American Nat'l Bank v. Pennsylvania R.R., 52 Ill. App. 2d 406, 202 N.E.2d 79 (1st Dist. 1964), *aff'd*, 35 Ill. 2d 145, 219 N.E.2d 529 (1966), *cert. denied*, 385 U.S. 1035 (1967). The appellate court decision, which was adopted by the supreme court, accepted the distinction between these two concepts. 52 Ill. App. 2d at 425, 202 N.E.2d at 89. To determine whether the presumption will operate, courts concentrate their attention on the child's capacity, experience, and intelligence. *See* Hughes v. Mendendorp, 294 Ill. App. 424, 429, 13 N.E.2d 1015, 1017 (1st Dist. 1938). The presumption can be overcome by offering evidence of all the factors which may be provided by his or her parents, teachers or friends. On the other hand, in order to determine whether the child has been negligent, courts examine the child's actions. *See* Wilkens, *Contributory Negligence of Very Young Children*, 20 CLEV. ST. L. REV. 65, 68 (1971).

134. 65 Ill. 2d at 103, 357 N.E.2d at 1132. *See* Shaver v. Berrill, 45 Ill. App. 3d 906, 358 N.E.2d 290 (2d Dist. 1976). The *Shaver* court appears to adopt the reasoning in *Diederich*. However, it does indicate that proof of the child's intelligence rather than the child's negligence serves to rebut the presumption. *Id.* at 908, 358 N.E.2d at 292. The *Shaver* decision suggests that the issue of whether the presumption has been rebutted is one for the trial judge. It is unclear whether the issues were totally briefed in *Shaver*. In any case, because the appeal revolved around a confusing special interrogatory, the court's discussion of presumptions constituted dicta.

135. The dissent in *Diederich* also suggests an acceptance of the presumption-by-presumption approach. *See* note 114 *supra*.

sumptions generally and towards the particular presumption at issue. Focus on the individual case restricts the tendency of courts to rely on dicta rather than analysis to assign procedural effect. In addition, under this theory courts are more likely to identify the correct type of evidence that could negate the presumption. Moreover, this approach reflects the current practice since Illinois decisions have looked at the purpose of some presumptions in order to assign procedural effect.[136]

The presumption-by-presumption approach admittedly is very complex because it dictates that the presumption field develop on a case by case basis. However, this poses no unusual burdens upon courts. Indeed, any difficulties experienced by using this approach would not be prohibitive in light of the fact that it would eventually guarantee an end to the confusion.

V. CONCLUSION

The Illinois courts apparently have adopted the bursting bubble procedural effect for all presumptions. However, in practice, courts have rejected the theory as a comprehensive guide, because this approach fails to provide sufficient flexibility for use with all presumptions. The *Diederich* court attempted to follow both the theory and the practice of the past Illinois presumption cases. By so doing, it produced an illogical and inconsistent decision.

Courts must no longer accept the generalization that the bursting bubble approach is the exclusive procedural effect for Illinois presumptions. Instead, Illinois' courts should adopt the presumption-by-presumption theory in order to attain rational decisions. Only an individualized analysis of both the nature and procedural effect of a particular presumption will guarantee that a presumption will produce its intended result. Acceptance of this theory will not wreak havoc upon the courts. Rather, adoption of the presumption-by-presumption theory will serve to merge theory and practice. Presumptions are too important an evidentiary device to deserve less.

Joanne F. Hurley

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136. *See, e.g.*, People *ex rel.* Gonzalez v. Monroe, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2d Dist. 1963); Brenton v. Sloan's Storage & Van Co., 315 Ill. App. 278, 42 N.E.2d 945 (4th Dist. 1942); Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149 (1896). In *Gonzalez* the court's assignment of the clear and convincing requirement resulted from a promotion of social policy. In the bailee cases like *Brenton*, the court's recognition that a plaintiff was not in a good position to prove negligence resulted in the court's decision to require the bailee to rebut the bailor's presumption by a preponderance of the evidence. In *Ashley* the court's concern with the accessibility of the parties to information concerning the action led the court to decide that the defendant's evidence should overcome the presumption only if the jury found it credible.